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Nos. 83-812 and 83-929

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GEORGE C. WALLACE, Governor, *et al.*,
Appellants,

DOUGLAS T. SMITH, *et al.*,
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

BRIEF OF MORAL MAJORITY, INC. AS *AMICUS CURIAE*

On Appeal from the United States Court of Appeals for the Eleventh Circuit.

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TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of Argument	2
Argument	
I. Denial to Public School Children of the Minimal Recognition of Theistic Religion Afforded by the Statute is a Denial to Them of the Free Exercise of Religion	3
II. Denial to Public School Children of the Benefits of the Challenged Statute is Not Required by the Establishment Clause	8
III. The Exclusion of Religious Observances from the Public Schools Results, Not in "Neutrality", But in a Religious Preference: A Tax-Supported Secularism	14
Conclusion	17

TABLE OF AUTHORITIES

Cases: Page

Abington Township School District v. Schempp, 374 U.S. 203 (1963) 4, 5, 6, 7, 8, 13, 14

Brown v. Board of Education, 347 U.S. 483 (1954) 4

Engel v. Vitale, 191 N.Y.S. 2d 453 (1959) 11

Engel v. Vitale, 206 N.Y.S. 2d 183 (1961) 13

Engel v. Vitale, 370 U.S. 421 (1962) . . 8, 11, 12, 13, 14

Everson v. Board of Education, 330 U.S. 1 (1974) 10, 21

Jaffree v. Wallace, 705 F.2d 1526 (1983) 6

Lemon v. Kurtzman, 403 U.S. 602 (1971) 11

McCollum v. Board of Education, 333 U.S. 204 (1948) 8, 9, 10, 14

Thomas v. Review Board, 450 U.S. 516 (1982) . . 15

Torcaso v. Watkins, 367 U.S. 488 (1961) 16

West Virginia State Board of Education v. Barnette, 391 U.S. 624, (143) 4

Wisconsin v. Yoder, 406 U.S. 205 (1972) 4

Constitutions:

United States Constitution:
Amendment I . . . . . Passim

Other Authorities:

J.I. Goodlad, A PLACE CALLED SCHOOL 4

HUMANIST MANIFESTOS I AND II 16

Michigan Department of Education, GUIDELINES FOR GLOBAL EDUCATION (1978) 15

Michigan Department of Education, SEX EDUCATION GUIDELINES, INCLUDING REPRODUCTIVE HEALTH AND FAMILY PLANNING (1978) 15

TABLE OF AUTHORITIES — *(Continued)*

Page

Michigan State Board of Education, THE COMMON GOALS OF MICHIGAN EDUCATION (1980) ... 15

W. Moberly, THE CRISIS IN THE UNIVERSITY 5

W.D. Valente, OVERVIEW OF CONSTITUTIONAL DEVELOPMENTS AFFECTING INDIVIDUAL AND PARENTAL LIBERTY INTERESTS IN ELEMENTARY AND SECONDARY EDUCATION 6

U.S. Department of Education, National Center For Educational Statistics, *DIGEST OF EDUCATIONAL STATISTICS*, 1983-1984 4

WEBSTER'S NEW COLLEGIATE DICTIONARY 3

INTEREST OF THE AMICUS CURIAE

Moral Majority, Inc., is a nationwide nonpartisan organization dedicated to the protection of religious liberty, human life, moral standards and traditional family values. It has chapters in forty-five states of the United States and a membership of approximately 4½ million Americans. Moral Majority, Inc., was founded in 1979 and is incorporated under Virginia law as a nonprofit charitable organization. Its principal address is 305 Sixth Street, Lynchburg, Virginia 24504.

Moral Majority strongly supports this statement of its founder, Dr. Jerry Falwell:

> "American leaders are rightly concerned about our overcrowded prisons, the rise of violent crime, the spread of drug abuse, and the rotting of the fabric of ethics in our society. So they call for more public spending, expanded social services, prison reform.
>
> "But when will they realize that a good society comes only from good people — people who feel bound by the moral principles given in the Bible and tied to recognition of God as our Creator and Judge? It is bad for our nation that we deny millions of children who attend our public school that recognition through a stated opportunity for them to pray.
>
> "From my personal experience, I know that my exposure to prayer in the public schools had a great and positive impact on me. It cultivated a character value that impressed on me the importance of respecting Divine authority as well as governmental authority. Polls constantly show that more than 75% of the American people want prayer back in school. Can those who oppose school prayer honestly say that our children are better off than we were twenty years ago? I have never met or heard of a child who was hurt by being exposed to voluntary school prayer. But I know of a nation that is very greatly hurt by banning it."

Moral Majority's interest in this case arises from the strong interest of its members in religious freedom. The statute challenged herein advances the enjoyment of a religious civil right.

SUMMARY OF ARGUMENT

The statutory allowance, in the public schools, of a period of time expressly set aside exclusively for meditating by children or their voluntarily engaging in prayer accommodates, within narrow tolerances, a religious need of children, the fulfilling of which is presently denied them. The reliance by the court below on various Establishment Clause decisions of the Supreme Court is misplaced, since application of those decisions in the premises would destroy, rather than protect, the enjoyment, by children, of First Amendment liberties. This case calls not only for weighing major Free Exercise considerations against trivial Establishment Clause claims but also for deciding whether a child's bare opportunity to minimally exercise theistic religious observance shall be subordinated to a preferred establishment of secularism.

ARGUMENT

Moral Majority considers that the provision in the challenged statute, which empowers the public school teacher to announce that a period of silence shall be observed "for . . . voluntary prayer" constitutes a recognition of theistic religion (since prayer is most commonly understood as an "address to God". WEBSTER'S NEW COLLEGIATE DICTIONARY, 869.).

Moral Majority recognizes, at the outset, that to speak of any official "recognition of theistic religion" appears to run contrary to holdings of this Court. But whether, therefore, the principle of *stare decisis* should at once operate to void the statute involves examination of four matters:

1. The reality that the American public school is today considered legally required to exclude theistic religion in any meaningful sense.

2. The fact that, for many believers, the exclusion of theistic religion from the central education experience and daily school environment of the child is an exclusion of the child from the enjoyment of a natural and basic liberty.

3. The reality that the religionless regime and environment, now officially imposed upon the publicly sponsored educational processes, constitutes a regime and environment of what is properly defined as secularism.

4. The fact that the decisions of this Court, in the cases held by the Court of Appeals to be here governing, should be held inapplicable to the case at hand.

I. Denial to Public School Children of the Minimal Recognition of Theistic Religion Afforded by the Statute Is a Denial to Them of the Free Exercise of Religion.

Children who attend school in all fifty states do so under compulsion of law. The typical school term covers

at least eight months of the year, for five days of the week, and for most of the daytime of each day. Thus the school is the predominant educational environment of the child and of commanding influence in the child's life.[1]

This Court has stressed the central role of schools in the life of the child — "educating the young for citizenship" (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)); "a principal instrument in awakening the child to cultural values, . . . and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Providing public schools is said to rank "at the very apex of the function of a State" due to its "high responsibility for the education of its citizens." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). A majority of American children (89%) attend public schools.[2]

While many individuals and organizations undoubtedly favor the exclusion of all forms of theistic religious observance from the public schools, and some others doubtless feel that those references to religion allowable in the schools under this Court's ruling in *Schempp*[3] make adequate provision for religion, there are many for whom the present public school relationship to religion is profoundly objectionable as denying their children religious freedom in any meaningful sense. In *Schempp*, the Court stated that it was not, by its ruling banning the

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1. Indeed, as has recently been stated, ". . . perhaps the school, now more comprehensive than the church in enrolling the young, is expected or at least permitted to do more of what home and church once did together in the spiritual realm. At any rate, in the [public] schools of our sample, from a low of 66% (in one of the high schools) to a high of 100% (in two elementary schools), parents we surveyed agreed rather strongly that 'it would be all right with me to allow prayers at this school'." J.I. Goodlad, A PLACE CALLED SCHOOL, 70.

2. *Digest of Educational Statistics*, 1983-1984. U.S. Department of Education, National Center For Educational Statistics (1984).

3. *Abington Township School District v. Schempp*, 374 U.S. 203, 225 (1963).

Bible-reading and Lord's Prayer practices there considered, establishing a "religion of secularism in the sense of affirmatively opposing or showing hostility to religion."[4] But it is obvious that what is left out of the program of a school, including its curriculum, may in itself be a positive teaching of the relative unimportance of the matter omitted, or perhaps even of its eccentricity. In any event, it certainly amounts to a teaching that man's relationship to God has not the stature or meaningfulness of everything else in the entire educational process and plainly is not essential to the formation of the whole person.[5] This, to the *amicus*, and to the parent intervenors herein, is seriously objectionable. They (and, to the knowledge of the *amicus*, a very large population of other Americans) consider that the total exclusion of religion, within the school day and on the school premises, is a serious deprivation to their children.

Against the foregoing, it is familiarly argued (a) that the Court in *Schempp* in no way barred the influence, upon the child, of home and church, but indeed emphasized the "exalted" place of religion in our society "through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind",[6] (b) and that, further, the Court stated:

> ". . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said

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4. *Id.* at 225.

5. As Sir Walter Moberly, chairman of the University Grants Committee of England, stated:

> "It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly. . . ." W. Moberly, THE CRISIS IN THE UNIVERSITY, 55-56.

6. *Schempp*, *supra*, at 225.

that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Ibid.*

This argument, however, misses wide the active concern of many believers:

(a) The relegating of religion to home and church and the child's heart and mind is, for many believers, the relegating of religion to a weak, collateral role at best. The nature of religious exercise and belief were not closely considered by the Court in *Schempp* perhaps because no parties before it had sought to advance Free Exercise claims on behalf of the challenged practices. *Schempp* was simply not focused on important aspects of the question of "What is belief to the believer?" In the present case numerous intervenors have informed the Court that the challenged statute accommodates their religious need, in that it gives positive recognition to prayer, a "quintessential religious practice" (see *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (1983)) and allows their children to participate in that practice as a practice publicly deemed worthy of recognition.[7] Religion, under the

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7. These intervenors labor under the burden described by Professor William D. Valente:

> "The political tension in public schools traces back to the nullification in the *McCollum* case of the option of public school parents to use their school buildings for private voluntary, religious instruction. The tension was heightened by the prayer and the Bible reading cases, which produced separate incommensurable constitutional tests for protection of free exercise of religion and for establishment of religion. Today, compulsion is required to establish a free exercise infringement, but not to show an establishment of religion; hence the protection of liberty is obviously stronger for those who oppose religiously offensive activity."

W. D. Valente, OVERVIEW OF CONSTITUTIONAL DEVELOPMENTS AFFECTING INDIVIDUAL AND PARENTAL LIBERTY INTERESTS IN ELEMENTARY AND SECONDARY EDUCATION, 1-2 (1979).

Alabama statute, is no longer "abnormalized" but treated as natural to the general learning environment of the child.

(b) The Court in *Schempp* substituted its own *religious* judgment that the omission of religious practice would be sufficiently made up for by installing courses in comparative religion, or study of the Bible for its literary and historic qualities, or teaching religion if "presented objectively as part of a secular program of education."[8] This prescription has been totally unacceptable to those many believers who do not conceive of religion as a secular matter, who consider the Bible as the Word of God, and who abhor comparative religion as destructive of belief. What is, for many parents, the *real thing* — religious observance — cannot presently be had in the public school where the child, at the most sensitive stage of being, spends most of his learning years, most of his days, and most of his vital hours in each day.

Whether there remain, nevertheless, sufficient reasons for the exclusion of every vestige of religion (in the real sense) from the public schools, undeniable are the facts that millions of children in the United States are compelled to attend public school (by virtue of the compulsory attendance laws, by economic circumstances or by parental preference) and that none may presently exercise liberty of religious observance within those schools.[9]

Twenty one years ago Justice Stewart, dissenting in *Schempp*, clearly exposed the falsity of the Court's elaborate but flawed rationale in *Schempp*:

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8. This judgment was based upon no evidence in the record, nor any reference to expert religious or psychological opinion.

9. Irrelevant would be an attempted rejoinder that if parents want a religious education for their children, they are free to send them to sectarian schools. Many parents cannot afford to do so or no such schools exist where they are. More importantly, however: if a parent exercises his liberty to choose public education, he should not be forced to accept it only on the condition that it be religionless.

> "With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private." *Schempp, supra,* at 313.

Over twenty years of experience under *Schempp* have brought home the wisdom of this warning by Justice Stewart.

II. Denial to Public School Children of the Benefits of the Challenged Statute is Not Required by the Establishment Clause.

The court below, the appellees, and their supporting *amici* all contend that the challenged statute's express provision for the opportunity to pray constitutes an establishment of religion forbidden by the Establishment Clause of the First Amendment. They must acknowledge, however, the obvious fact that the Supreme Court has *not* passed upon the two First Amendment questions here presented pertaining to religious liberty and to non-establishment. Their necessary contention is that the Ccurt's decisions in cases of the past — *McCollum*[10], *Engel* [11] and *Schempp* — are so completely in point and

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10. *McCollum v. Board of Education*, 333 U.S. 204 (1948).
11. *Engel v. Vitale*, 370 U.S. 421 (1962).

so persuasive in rationale that they dictate the striking down of the Alabama law. While none of the three cases is factually in point, they require re-examination in light of the realities relating to the present statute and case as these pertain to genuine religious freedom.

All three decisions were responsive to suits brought by parents to rid the public schools of theistic religious practices. They were three decisions favoring *some* parents. They in fact denied parental rights to many other parents.

McCollum represented a devastating and historic blow to parental liberties — and to community consensus, pluralism and religious liberty. In the year the case was started, the School District of Champaign, Illinois, had, with great labor, brought into being a plan which it deemed to be a beneficent device for the accommodation, within the public schools, of the religious liberty of children (and relatedly of their parents). Apparently not considering that it might be taking a first step toward rendering the public schools, not religiously "neutral", but religiously secularist, the Court voided the plan. The plan was the product of deliberations by a council made up of interested Jews, Catholics and Protestants. Under the plan, the local board of education permitted weekly classes in religious instruction to take place on public school premises in grades four through nine. No child was required to participate. No expense to the School District was involved, the instructors being the employees of the interreligious council. The parent initiated the child's participation through signing a card requesting the instruction. The instructors were subject to approval by the superintendent of schools, this apparently to insure that persons promising harm to children or disruption of the regimen of the school could be kept out. The evidence established that this provision had never been employed to deny access to any religion's representative. It was further found by the trial court that the religious education classes (with which, by the time of trial, there had been five years experience) had not been promotive

of sectarian differences, but had in fact "fostered tolerance rather than intolerance".[12] As against the acceptance and support of the program by a majority of the parents, one parent, Mrs. Vashti McCollum, who described herself as a "rationalist", sought to end the program. In the Supreme Court she prevailed.[13] The bases for the Court's decision become interesting to reexamine in 1984, when the cumulative effect of decades of parental frustration over denial of religious liberty for children in public schools has apparently reached an explosive pitch.

The Court's opinion (by Justice Black) was erected upon the sands of Justice Black's *Everson* opinion[14] — his imaginative (and historically inaccurate) picture of the meaning of the Establishment Clause. The Court's point was that the use made of "tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council" violated the principle of absolute church-state separation. The Court ignored all facts contained in the trial record which showed how salutary the program was in accommodating the liberties of students and parents, or how the program offended no one except the pressure groups which had helped convoy Mrs. McCollum to her victory. While the lady's interest in obliterating the program appeared to be less that of a parent than that of a "rationalist", the interests of all the other parents did not

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12. From the trial court findings as quoted in dissenting opinion of Justice Reed, *McCollum, supra*, at 243, n. 6.

13. She prevailed although she had failed to allege any violation of the federal Constitution. The Supreme Court said that the fact that the Illinois courts had dealt with such question sufficed.

14. *Everson v. Board of Education*, 330 U.S. 1 (1947), wherein Justice Hugo Black, in dictum, speaking for the Court, devised a view of the Establishment Clause, completely unknown to history, whereby the Clause was seen to bar Government from the support of "any religious activities" (*id.*, at 15-16) apparently without regard to any consequence to the consciences of those tax-paying parents and their children who could not accept a sterilely irreligious learning environment for their children.

intrude upon the Court's thinking. Not once in the opinion of the Court appears a single line devoted to *their* equities. Justice Felix Frankfurter penned a long concurrence likewise expressing no concern for them, but going on to say how children who did not participate in the program would be harmed. Evidence of those dreadfuls, however, was nowhere to be found in the record. No parent or child, victimized by the program, had given evidence at the trial of any trauma the program caused. The harm was indeed of a more incorporeal sort: harm to a *principle* — *i.e.*, to a narrow philosophic prejudice insistent that *its* values be imposed as superior to any parental rights or children's liberties.

Thus the Court destroyed a socially valuable community agreement which, over years, had been painstakingly developed. An important value of the program lay in its encouraging religious pluralism — a value later said in Court opinions to be important.[15] The greater damage, however, was the damage to the proper interests of religious parents; furthermore the Court had now set the stage for the total establishment of secularism in the public schools which would be accomplished fifteen years later.

Engel v. Vitale was an action by the parents of public school pupils to bar use, in their school, of a prayer[16] composed by a governmental body, the New York Board of Regents. The prayer was to be recited aloud; no pupil was to be compelled to participate if his or her parents objected. School authorities were forbidden to comment upon nonparticipation of any student, students being permitted to remain silent or to be excused entirely from the exercise. The parents who sued included "members of the Jewish faith, of the Society For Ethical Culture, of the Unitarian Church, and one non-believer."[17] They

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15. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)

16. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

17. *Engel v. Vitale*, 191 N.Y.S. 2d 453, 467 (1959)

claimed that the prayer practice violated the Establishment Clause of the First Amendment. After the case was underway other parents intervened, claiming that to ban the practice violated rights of theirs' protected by the Free Exercise Clause of the same amendment. The Supreme Court held the program to be void as an establishment of religion, and what is remarkable about its opinion is its reliance upon irrelevant history and its complete failure even to mention the asserted parental rights of the intervening parents. The historical props by which the Court, in lengthy footnotes, sought to support its opinion ranged from the Inquisition through the depredations upon religion of Mary Tudor and Elizabeth I, the persecutions of John Bunyan and Roger Williams and the Virginia assessments against which Madison had inveighed. The Court summarized its key point: ". . . the historical fact that governmentally established religions and religious persecution go hand in hand."[18] In other words, the 24-word prayer — in spite of the procedural safeguards which had been attached to its use — set the stage for religious persecution in New York. In fact there existed no credible connection whatever between the prayer program and the dreadful historical episodes with which the footnotes were threaded. And this historical overstatement sufficed to render any discussion of the religious liberties of the intervenors unnecessary. Thus was ignored a wise earlier admonition of the New York Court of Appeals (which had upheld the prayer program). It had quoted a statement of a Mr. Spencer, the State Superintendent of Schools in 1839:

> "*Both* parties have rights; the one to bring up their children in the practice of publicly thanking the Creator for his protection and invoking his blessing; the other of declining on behalf of their children, the religious services of any person in

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18. *Engel v. Vitale*, 370 U.S. 421, 432 (1961).

> whose creed they may not concur, or for other reasons satisfactory to themselves."[19]

The Regents Prayer Case caused a national storm of criticism — characterized by supporters of the decision as a mere "intemperate outburst" but in fact expressing a widespread and profound anxiety over the ultimate significance of the decision. The Supreme Court, with but one dissent (that of Justice Stewart), had banned the prayer because it was religious. The Court's words were:

> ". . . the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily invocation of God's blessings as prescribed in the Regents' prayer is a *religious activity*."[20]

The country read the matter rightly. "Religious activity" — *any* religious activity — was now purged from the schools which most children attend. There followed, next term, a third in the trilogy of cases relating to religion in the public schools — and hence vitally affecting religious liberty in education. The Supreme Court's decision in that case has been hailed as an historic balancing of interests in religious liberty as against the public interest in non-establishment of religion in the schools. Unfortunately, it is not. Rather it appeared to serve as an elaborate attempt of the Court to defuse the intense controversy which had followed its *Engel* decision. The case, *Schempp, supra,* was actually a pair of cases — the Lord's Prayer case from Maryland and the Bible-reading case from Pennsylvania.

The plaintiffs in the Pennsylvania case were Unitarian parents and their children; those in the Maryland case were Madalyn Murray and her son, both professed atheists. No parents favoring the practices were parties in these litigations. The true impact of *Schempp* has

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19. *Engel v. Vitale*, 206 N.Y.S. 2d 183, 192 (1961).

20. *Engel v. Vitale*, 370 U.S. 421, 424 (1962). (Emphasis supplied).

been discussed *supra* at pp. 4-8. It has militated against, and not for, religious civil rights.

The *amicus* therefore submits (a) that no past decision of this Court actually governs the case at hand, (b) that the *McCollum*, *Engel* and *Schempp* decisions rest upon untenable bases which should not further be advanced to limit religious freedom, and (c) that no religious claim should be disqualified merely because it is the claim of a majority; the high percent of Americans favoring the opportunity for prayer in the public schools is, after all, but a population of individuals. Each asserts his or her own religious right as a minority of one.

III. The Exclusion of Religious Observances From the Public Schools Results, Not in "Neutrality", But in a Religious Preference: a Tax-Supported Secularism.

The *amicus* does not believe that the Supreme Court of the United States, in the *McCollum*, *Engel* and *Schempp* decisions, intended imposing secularism upon American children. The Court instead appeared deeply conscious of the evils of subjecting any religious or nonreligious minority of children to embarrassment, isolation, "odd ball" status, pressures to conform and, certainly, to proselytizing. Moral Majority believes the Court was right in its concern (which Moral Majority deeply shares), but wrong in its solution. No evidence is found in the present record that any child will suffer any of the foregoing disabilities because other children's liberties are recognized. The fact is undeniable that the result of the Court's decisions has been to bring the public schools to the regime of secularism foreseen by Justice Stewart.

Absolutely accurate is a more recent comment by a Justice of this Court:

> "There can be little doubt that to the extent secular education provides answers to important moral questions without reference to religion or teaches that there are no answers, a person in one sense

sacrifices his religious belief by attending secular schools." *Thomas v. Review Board*, 450 U.S. 707, 724 (n. 2) (1982). Rehnquist, J., dissenting.

The public school either "provides answers to important moral questions" or, in the alternative, teaches that there are no answers. Inevitably it does these, because it has children in its keeping — with their questions, probings, problems, varieties of conduct, and personal crises. Further, there is widespread belief among public educators that the public school has the *duty* to guide children, not only through "cognitive" education, but through "affective" education — that is to mold them for what is deemed (by some standard or other — but not a theistically religious standard) for "good" citizenship, for "successful" interpersonal relationships, for "health" (including sexually related maters). Not lacking in these prescriptions are concepts of what a "good" social order should consist, of how "understanding" may be achieved among nations.

Typical of these programs are those afforded by Michigan. The Michigan State Board of Education, in THE COMMON GOALS OF MICHIGAN EDUCATION (1980), stresses "attitudes" which students should achieve (*id.* at 5). The "attitudes" include "moral values needed for participation in a democratic society" (*id.*, at 6), "attitudes necessary for responsible family membership" (*id.* at 9), etc. The Michigan Department of Education has issued GUIDELINES FOR GLOBAL EDUCATION (1978), and SEX EDUCATION GUIDELINES, INCLUDING REPRODUCTIVE HEALTH AND FAMILY PLANNING (1978). These abound with value-related subtopics.

This widespread kind of programming is mentioned, not to deny that schools may teach values, but to point out that, in our public schools today, *all* of these programs must be presented *without* traditional Judeo-Christian value judgments and are presented *with* nontheistic value judgments. They thus constitute what is known as Secular Humanism. Secular Humanism is a

religion.[21] It now is awarded a legally preferred status and is supported by taxes extracted from all taxpayers.

Appellants in this case have raised no challenge to any particular public school educational program on Establishment Clause grounds related to the official preference now given for the religion of Secular Humanism. Rather, the existence of preference highlights the propriety, value and need for a degree of constitutional balancing with respect to the public school in order to accommodate the religious aspirations of many students who today are officially disfavored.

Against this, it will of course be argued that once the "entering wedge" of the contested statute is held valid, the stage will have been set for expansion — with the prospect of opening up religious conflicts and spreading divisiveness. Such concerns ought not be countenanced when employed as bugaboos (as sometimes they are) to suppress religious liberty. The position of the *amicus* comes simply to this:

> a. Religious liberty is denied to many children in our public schools today, and secularism imposed, by virtue of past Supreme Court rulings.
>
> b. The statute in question affords a significant accommodation to the freedom of those children.

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21. This Court has long since held Secular Humanism along with Ethical Culture, to be a "*religion*" within the meaning of the First Amendment. *Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961). While this appeared to have been in a Free Exercise context, it is clear that Secular Humanism is a "religion" whose establishment is barred by the Establishment Clause. As Justice Rutledge, dissenting in *Everson*, stated:

> " 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof'." *Everson, supra*, at 32.

Secular Humanism claims itself to be a religion in the legal sense (see HUMANIST MANIFESTOS I and II, 1-10) and the religion which should pervade and control society. Ibid., passim.

c. No tangible injury-in-fact will come to other children. Indeed all children will benefit from the knowledge that all are fairly served.[22]

The safeguards given Americans by the Religion Clauses of the First Amendment are of absolute importance. But the clauses are not absolutes, as the Court has lately repeatedly stressed. The rigid application of the Establishment Clause to bar recent generations of children from the enjoyment of religious liberty has been an unfortunate example of constitutional absolutism. The wisdom of this Court has generally worked toward balance, the fair and sensible mean, as opposed to the perfectionist ideological extreme. This is plainly what the Court will rest upon here in upholding the statute for the benefit of religiously disadvantaged children.

CONCLUSION

For all of the foregoing reasons, the *amicus curiae* respectfully urges that the judgment below be reversed.

Respectfully submitted,

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22. Nor, obviously , would the Court's upholding of the statute provide the slightest ground for departing from its prior rulings barring subsidy to religious institutions.